

1 JUDGE LUTON: Let's do it that way. That would help
2 get me oriented.

3 MR. BERFIELD: Do you think that that may help?
4 Okay. Okay. And I would, I would then move the -- move 3 and
5 4 and I'd like to say in support we're relying on the GAF
6 decision and we're relying on our assertion that there is a
7 special question here as to EEO compliance. Commission Rule
8 73.2080(b)(4) requires a licensee to conduct a continuing
9 program to exclude all unlawful forms of prejudice or
10 discrimination based upon race, color, religion, national
11 origin or sex from its personnel policies and practices and
12 working conditions. And what you have here in an arbitration
13 decision to which EZ was a party and which they have contested
14 is that you have an arbitrator finding that the working
15 conditions at the station with regard to Ms. Randolph that
16 they were such an -- example of sexual harassment that she was
17 entitled to actually walk off the job and they were directed
18 to pay severance pay. Furthermore, that opinion by the
19 arbitrator was upheld in the Federal District Court. That
20 opinion and order are on Exhibit No. 4. So it seems to me by
21 any reasonable basis in order to rebut the showing they've
22 just made on EEO and under the ruling in GAF, we're entitled
23 to have this information considered. Now, as far as to the
24 confidentiality order in court, I will say that I think
25 there's substantial evidence that that was a confidentiality

1 order that EZ wished to have and, no doubt, proficiated. And
2 for them to go -- to have a matter which the FCC would
3 normally consider and then go into a local court and get a
4 settlement, make a settlement, and then get a confidentiality
5 or a gag order, they're called, and then to use that as a
6 shield from the federal government looking into these matters
7 -- I mean, they brought this -- they could go to the court
8 tomorrow and ask for release on the confidentiality order and
9 present whatever ameliorating circumstances or evidence on
10 rebuttal that, that they choose to. But to permit them to say
11 that this exhibit can't come in because there's a
12 confidentiality order that favors them without seeking them to
13 go and get it released, I think would not be due process for,
14 for us and, more importantly, it wouldn't develop a full
15 record for your, for your consideration.

16 JUDGE LUTON: There's been a response and there's
17 been talk about it. I'm going to ask for a response to what's
18 just been stated.

19 MR. MILLER: Yes, Your Honor.

20 MR. ZAUNER: Your Honor, may I just make a comment?

21 JUDGE LUTON: I'm sorry. Mr. Zauner?

22 MR. ZAUNER: Your Honor, as I understand Mr.
23 Berfield's argument for the relevancy of the Liz Randolph
24 material, it seems to be that EZ has violated Section 73.2080
25 of the Commission's rules. However, this material doesn't

1 show such a violation and the Hearing Designation Order so
2 found. Section 73.2080 is designed to prevent discrimination
3 by licensees on the basis of race, color, religion, national
4 origin or sex in the recruiting, hiring and promoting of
5 employees. There is no evidence in these exhibits that, that
6 WBZZ discriminated in the recruiting, hiring and promoting of
7 employees. This is an entirely different action that occurred
8 with regard to Liz Randolph and, therefore, this information
9 is irrelevant to show a violation of 73.2080.

10 JUDGE LUTON: It is -- are you -- is it your effort,
11 Mr. Berfield, to show a violation of the Commission's EEO
12 rule?

13 MR. BERFIELD: Yes, in part that's correct, Your
14 Honor. I mean, I must respectfully disagree with Bureau
15 counsel. I mean, it's not just the hiring. It says conduct a
16 continuing program to exclude all unlawful forms of prejudice
17 or discrimination based upon, other things, sex from its
18 policies, practices and working conditions. Now, working
19 conditions is quite different and that's exactly what this --
20 this occurred

21 JUDGE LUTON: Are you both reading the same rule?

22 MR. BERFIELD: Well, I'd like to present you with a
23 copy of it. I mean --

24 JUDGE LUTON: Well, I don't doubt what -- what's
25 being read to me.

1 MR. BERFIELD: No, I know that.

2 JUDGE LUTON: I just wondered if the two of you are
3 reading the same thing.

4 MR. BERFIELD: Well, I must say, Your Honor, that
5 that's the position that the Mass Media Bureau took and they
6 took the view that EEO only applies to her which, to me, is
7 just so contrary to the plain language of (b)(4) that it can't
8 be upheld. But that was in the context, I point out, of a
9 absolute issue, but now we're in the context of renewal
10 expectancy and the more recent GAF case where I think the
11 Commission is re-emphasizing their, their importance of EEO
12 and they want to know about EEO compliance, and to say that
13 this doesn't -- does not represent an EEO matter, I think,
14 flies in the face of the common language of the rule.

15 JUDGE LUTON: With respect to renewal expectancy and
16 EEO, is it necessary in order for the renewal expectancy to be
17 effected for an EEO violation to be shown or is it rather a
18 matter of conduct? What does GAF say anymore? You got the
19 case there?

20 MR. MILLER: Your Honor, I have a copy that I
21 retrieved from Lexus (Phonetic) yesterday. It has some
22 underscorings and --

23 MR. BERFIELD: I have a copy without it.

24 JUDGE LUTON: That's all right. It doesn't matter.
25 There's one portion of it I want to look at at the present

1 time. Thank you.

2 MR. KRAUS: Your Honor, may I, may I speak for a
3 moment --

4 JUDGE LUTON: Yeah.

5 MR. KRAUS: -- to put this into some perspective?

6 JUDGE LUTON: Well, sure, I'll give you that
7 opportunity. I just want to express my frustration at what
8 I'm reading here to the extent that there may be ambiguity
9 about our policy. I wish to emphasize that and renewal
10 proceedings, allegations involving the licensee's violation of
11 the Act and other things, can be relevant. From the above it
12 would appear that alleged violations of the rules, if they
13 raise a prima facie case -- I'm talking about allegations on
14 the part that's set up to -- where the Commission is talking.
15 It talks in terms of compliance with the Communications Act or
16 rules and policies, violations of the Act, no longer
17 allegations, more specific, or violations of Commission rules
18 or policies. There it seems to be talking about conduct,
19 about which determinations have been made, and in the next
20 paragraph they talk about allegations involving a violation,
21 not determined allegations. I don't know what all that means.

22 MR. MILLER: Well, maybe --

23 JUDGE LUTON: Can you help me?

24 MR. BERFIELD: Can I try? I'll try, Your Honor.

25 JUDGE LUTON: Please.

1 MR. MILLER: Allegheny made allegations in its
2 Petition to Deny that there had been EEO violations. The
3 Hearing Designation Order rejects those and found that there
4 were no violations. Now, it seems that we're pretty much
5 bound by that, particularly since Your Honor declined to
6 certify the HDO to the Commission. But putting this in
7 context, this -- WBZZ had a morning show. It involved two
8 announcers known as Quinn and Banana and Ms. Randolph. Ms.
9 Randolph, Ms. Randolph read the news, but part of her job was
10 to go beyond reading the news and engage in banter with these
11 two disc jockeys. The lapses, if you want to refer to them
12 here, involve comments when Ms. Randolph was there, two of
13 them when she was not there, and apparently one of them --
14 some of them when she was there, that had certain arguably
15 sexual innuendo embedded in them. Ms. Randolph took offense
16 at those things and Exhibits 3, 4 and so forth evolved out of
17 that. But the Commission's EEO rules nowhere talk about a --
18 an entertainment employee, and she was in this context,
19 willingly or unwillingly engaging in the course of
20 entertainment programming in banter. It simply has nothing to
21 do with this. Now, as to the impact of the court order on our
22 ability to discuss these things, Allegheny has identified, and
23 I assume will offer, a bootlegged copy of a transcript of the
24 hearing in chambers before the judge and, if you would look at
25 that for a moment, on page 2 the court says, "The parties

1 agree that the record -- the parties agreed that the entire
2 record will be sealed by court order, including transcripts or
3 testimony, any pleadings, documents filed, briefs, letters
4 that were attached as exhibits. All will be sealed by court
5 order." On the following page he continues, "An essential
6 consideration of this settlement is the need for
7 confidentiality on both sides. Plainly it should be
8 understood by both parties should there be any breach of the
9 confidentiality provisions that the court will entertain a
10 contempt action against the breaching parties." Now, EZ was
11 not without information about Ms. Randolph that I guess would
12 be pertinent to place this banter in context. I don't know
13 that Ms. Randolph would agree to the public's dissemination of
14 that material at the hearing. I don't know that we can get a
15 court order to permit us to ventilate it, and there simply is
16 no relevance under the comparative issue or under the renewal
17 expectancy matter to the sensitivity or propriety under
18 community standards or propriety under the standards of, of a
19 number of listeners as to the jokes that were told.

20 JUDGE LUTON: No what? No standards, did you say?

21 MR. MILLER: The Commission has decided that nothing
22 that happened here raised any issues of obscenity or
23 indecency, but whether there were people in the community who
24 felt offended by the innuendo involving Ms. Randolph or not
25 doesn't seem to be pertinent to our renewal expectancy or to

1 anything else legitimately at issue in this proceeding.

2 MR. KRAUS: Your Honor, could I raise one additional
3 point which I'm more familiar with that Mr. Miller?

4 JUDGE LUTON: Yes.

5 MR. KRAUS: The Liz Randolph hearing went on for a
6 number of years and involved a great many documents, a
7 substantial amount of trial testimony, and in part involved
8 the question of her medical condition, psychiatric and
9 physical condition, involved in part her personal life and
10 stresses and strains and how they related to her claim. And
11 the key question in the trial -- one key question was if she
12 was so concerned about this matter, as she claimed eventually
13 she was, why is it she never made a complaint about it to the
14 station? And why -- what were the factors that, other than
15 the station's, other than these alleged comments, that may
16 have led to her alleged mental and emotional problems. I
17 think there was a keen interest on her part in making certain
18 that the medical and psychiatric material that's in that
19 transcript not become available for dissemination and that
20 that was a major reason why there was a confidentiality order
21 by the judge, and I think that's worth saying in view of the
22 suggestion that, that we locked the record up ourselves simply
23 to avoid dissemination of material that might be embarrassing
24 to us. Your Honor, can we have some assurance that, that did,
25 in fact, get on the record?

1 REPORTER: Yes, I did get everything he said.

2 JUDGE LUTON: Mr. Berfield?

3 MR. BERFIELD: Thank you. Well, I think -- with all
4 due respect, I think counsel's arguments are somewhat straying
5 from the point. They're speaking outside the record and -- to
6 give their version of what went on, but I would point out that
7 a more accurate summary of what happened is contained in the
8 arbitrator's decision on our Allegheny page 15 where the,
9 where the arbitrator, after hearing the evidence from Randolph
10 and from the station, said that, "I find that the banter
11 interplay the grievant was subject to goes well beyond
12 anything that could even remotely be considered part of one's
13 job requirement. The jokes and suggestive remarks that were
14 directed to her were lewd, offensive, sophomoric, in bad taste
15 and beyond anything that an employee should have to subject to
16 even if they are part of an entertainment field." Then he
17 says, "Fortunately or unfortunately, depending on a
18 perspective, the First Amendment protects such forms of
19 expressions and censorship. Constitutional protections,
20 however, do not mean that an individual with reasonable
21 sensibilities must be unwilling bombarded or subject to such
22 forms of free speech, at least not as a mandated job
23 requirement or within the confine of one's work environment.
24 I find a parallel exists in this situation with circumstances
25 that precipitated and are now governed by the federal

1 government's sexual harassment laws. An employee no longer
2 has to put up with a hostile work environment that is created
3 on the basis of sex, be it in the form of jokes, comments,
4 suggestions and touching." Now, Your Honor, these -- this
5 matter -- we have a -- we have an adjudication. We have a
6 finding of fact. We have certainly collateral -- on this
7 finding and here he's talking about the very things that the
8 Commission's talking about on EEO. And it seems to me we
9 certainly -- this document and the Federal Court upholding the
10 arbitrator as to his findings and as to his determination I
11 think meet any threshold test that's set out in the GAF case.

12 JUDGE LUTON: How are you going to show a violation
13 of the Commission's rules here when the Commission was aware
14 of the arbitrated decision when it issued the Designation
15 Order? Presumably it was aware of it, had to be, what was in
16 it and, nevertheless, it declined to find a violation.

17 MR. BERFIELD: Well --

18 JUDGE LUTON: You indicated that one of the things
19 you were going to attempt to do -- to show --

20 MR. BERFIELD: Yes.

21 JUDGE LUTON: -- was that there were violations of
22 the Commission's EEO rules. The Commission itself didn't find
23 one.

24 MR. BERFIELD: All we have so far from the
25 Commission is the Designation Order and the Mass Media Bureau.

1 Now, you know, we have an appeal pending to the, to the full
2 Commission --

3 JUDGE LUTON: Right, but as --

4 MR. BERFIELD: -- on that?

5 JUDGE LUTON: -- things presently stand, the
6 Commission declined to find that its EEO rules had been
7 violated, did it not, on the basis --

8 MR. BERFIELD: That's correct.

9 JUDGE LUTON: -- on the basis of the information
10 that you're talking about, some of which you just read to me?
11 The Commission no doubt looked at the same language and came
12 to a different conclusion --

13 MR. BERFIELD: Well --

14 JUDGE LUTON: -- concerning whether or not its rules
15 had been violated.

16 MR. BERFIELD: As I recall, the HDO, the Hearing
17 Designation Order, the ruling was a limited one that said
18 equal employment practices are finally to, to hiring and that
19 just -- that interpretation is just incomprehensible in view
20 of the scope of the rule.

21 JUDGE LUTON: Well, you may not agree. The
22 Commission was wrong, but -- perhaps, or at least in your view
23 it was wrong, but the circumstances themselves permit the
24 view, do they not, that the Commission took a look at the
25 arbitrator's decision, particularly including that language

1 that you just read to me, and declined to find that its EEO
2 rules had been violated? Isn't that a fair --

3 MR. BERFIELD: That's correct.

4 JUDGE LUTON: -- way to look at that?

5 MR. BERFIELD: That's correct. That's what the HDO
6 told us.

7 JUDGE LUTON: In view of that, how does Allegheny
8 hope to, to show an EEO violation?

9 MR. BERFIELD: Well, we're hopeful, of course, that
10 we'll get a favorable ruling from the Commission and we're
11 trying to maintain --

12 JUDGE LUTON: Well, that's down the road. I mean,
13 for purposes of this hearing, this proceeding, how --

14 MR. BERFIELD: Well, we would like to present,
15 present this evidence and then make our arguments and findings
16 to you to the effect that, that there was a violation and that
17 the reading of the rules and the HDO and whatever additional
18 evidence that might be developed --

19 JUDGE LUTON: Additional evidence? You mean you
20 would expect me to try this over again --

21 MR. BERFIELD: No.

22 JUDGE LUTON: -- at least to some extent?

23 MR. BERFIELD: No.

24 JUDGE LUTON: How would I receive additional
25 evidence on it?

1 MR. BERFIELD: I don't, I don't mean additional
2 evidence of retrying the incident. No. I mean in terms of
3 how the station responded, station management. In other
4 words, the station has presented information as to their EEO
5 practices, not only their EEO practices at that station, but
6 their EEO practices generally. Now, we'll be entitled, I
7 would think, to cross-examine on that basis and we would be
8 able to cross-examine them as to their policy on sexual
9 harassment matters and so forth. That's -- I don't mean, I
10 don't mean additional underlying information. It's our view
11 that that's settled.

12 JUDGE LUTON: Okay. But one of the things that you
13 would -- that Allegheny would be asking me to do would be to
14 find a violation of the Commission's EEO rules based on this
15 adjudicated conduct about which we have gotten much talk about
16 it.

17 MR. BERFIELD: Yes. We would be arguing that, Your
18 Honor.

19 JUDGE LUTON: You would ask me to find a violation
20 of the EEO rules?

21 MR. BERFIELD: Yes, Your Honor.

22 JUDGE LUTON: Now, that -- would that be for
23 comparative purposes or --

24 MR. BERFIELD: Yes, sure, just for comparative
25 because we -- because this is, this is in the context of

1 their, their assertion in the Exhibit 5 -- well, 3, 4 and 5.

2 There's one --

3 JUDGE LUTON: Okay.

4 MR. BERFIELD: We're very good at EEO and we're
5 going to argue -- and also that we complied with all the rules
6 and it seems to me I'm entitled to, to challenge that.

7 JUDGE LUTON: Okay. I just wanted to be clear about
8 the --

9 MR. BERFIELD: Fine.

10 JUDGE LUTON: -- first prong -- I understand there
11 are two prongs -- of Allegheny's position. One that it wishes
12 to present is to try to persuade me in the first instance that
13 there has been -- the conduct the Commission has already
14 looked at and about which it did not find an EEO violation
15 should, nevertheless, be held -- that that conduct be held to
16 constitute an EEO violation by me, number one. Number two
17 with respect to the renewal expectancy, what is it that
18 Allegheny hopes to do there?

19 MR. BERFIELD: This is in the context of the renewal
20 expectancy. In other words, we would not -- based on the
21 present issues, obviously we're not arguing there would be a
22 disqualifying --

23 JUDGE LUTON: Right.

24 MR. BERFIELD: We're just -- we would argue, one,
25 that it was a violation and that, two, just as they're trying

1 to, just as they're trying to prove that they did more in
2 terms of complying with EEO than, than you need to do, and
3 apart from the question of real violations, we'd be arguing
4 that there was also an insensitivity in this, at least this
5 one area of EEO, and we'd be arguing that as a counterbalance
6 -- counterpoint to their assertions as to their EEO record.

7 JUDGE LUTON: All right. That's what I wanted to be
8 clear on.

9 MR. BERFIELD: That's correct. Both prongs, Your
10 Honor.

11 JUDGE LUTON: I want to be clear on.

12 MR. BERFIELD: That's correct.

13 JUDGE LUTON: I think that's important enough for me
14 to make a note.

15 MR. KRAUS: Your Honor, will we get a further chance
16 to comment on what Mr. Berfield has just said?

17 JUDGE LUTON: Sure, but I want to hear from Mr.
18 Zauner first. I believe you had -- I thought I saw you
19 indicating a desire to speak.

20 MR. ZAUNER: Your Honor, my desire to speak was the
21 desire to indicate my agreement with what you said concerning
22 the Hearing Designation Order. I agree with you completely.
23 The Commission has already spoken and determined that there
24 was no violation of Section 2080 and, given that, that
25 concludes that. Mr. Berfield made a comment, well, it was the

1 Mass Media Bureau that made the determination but as -- I
2 think we all know that when one of the Commission's subsidiary
3 organizations acts pursuant to delegated authority, it's the
4 same as the Commission acting. I think that the information
5 regarding Liz Randolph is, is irrelevant. It has been fully
6 considered by the Commission and --

7 JUDGE LUTON: In your view is all this material
8 concerning the Randolph matter also irrelevant with respect to
9 the claim of renewal -- the effort, the seeking of renewal
10 expectancy?

11 MR. ZAUNER: Yes.

12 JUDGE LUTON: Equally irrelevant?

13 MR. ZAUNER: It's irrelevant with regard to the
14 renewal expectancy, too. I agree, I agree with the argument
15 that was made earlier by Mr. Miller that these allegations go
16 to the station's entertainment programming and that they have
17 nothing to do with the station's public service programming.

18 JUDGE LUTON: Okay. Now, Mr. Berfield, that's one
19 that you, you didn't address, the Liz Randolph matter that's
20 seeming tilt toward or it's seeming concerned with the
21 entertainment side of BZZ's business.

22 MR. BERFIELD: Well, I don't think that the renewal
23 expectancy is limited just to non-entertainment necessarily.
24 I mean, if a station, if a station has programming that --
25 because they -- they're sprinkled throughout their, their

1 public witness testimony and there are assertions of how much
2 they helped with all kinds of entertainment activities out in
3 the community that were somehow tied into community
4 activities, so it's --

5 JUDGE LUTON: Well, that's a different matter as I
6 see it. Anyway, I disagree with that.

7 MR. BERFIELD: But, no, I'm just saying, I'm just
8 saying by way of analogy that it seems to me that if, if -- in
9 other words, a licensee runs on their record and it seems to
10 me obviously their record has to consist of their -- of non-
11 entertainment programming, but I don't think entertainment
12 programming is excluded from, from consideration.

13 JUDGE LUTON: Okay. That's all I wanted to hear on
14 that particular point. Now I'm going to give --

15 MR. KRAUS: Yes, Your Honor. I think the, I think
16 the decision you have to make here is really basically very
17 simple. The fact of the matter is that in its Petition to
18 Deny which was before the Commission when these applications
19 were designated for hearing, Mr. Berfield and Allegheny
20 presented the Commission with the arbitrator's report, with
21 the court decision which upheld that they were both exhibits
22 in the Petition to Deny, they're both exhibits as it happens
23 -- and the precise material that you're being asked to rule
24 upon now was before the Commission at the time of designation.
25 Now, the Commission didn't say well, there was no EEO

1 violation for, for disqualifying purposes, but there may have
2 been one for comparative. They said there was no EEO
3 violation. If there's no EEO violation it can't relate to
4 either disqualify or comparative. Zero is zero. By the same
5 token, Allegheny argued that there was a violation of the
6 Commission's rules relating to indecency. The Commission said
7 no, there wasn't and they specifically ruled on that. They
8 said there was news distortion. The Commission said no, there
9 wasn't. Nothing here approaches what we consider to be news
10 distortion. So each of the arguments which Allegheny now
11 makes was made in their Petition to Deny, has been made on
12 their appeal, and each of them has so far been rejected by
13 everybody who's looked at them. And I don't see how it's
14 possible under those circumstances to properly be -- for you
15 to be asked now to consider the same material all over again
16 and for you to be asked to overrule the Commission's decision
17 which has been very clear. Now, if the Commission reverses
18 itself or its stand on appeal and says oh, my goodness, there
19 was news distortion, there was slander or whatever, then
20 that's another matter.

21 JUDGE LUTON: Okay. Let me ask you this. Putting
22 aside for the moment Allegheny's effort to seek finding of an
23 EEO violation, we nevertheless have conduct which has been
24 adjudicated. Is there in your view any independent way, that
25 is to say, independent finding of a violation of a particular

1 rule, for me to consider that conduct --

2 MR. KRAUS: Your Honor --

3 JUDGE LUTON: -- as it relates to the weight to be
4 given to the renewal expectancy if, indeed, there is one?

5 MR. KRAUS: The conduct is relevant only to the
6 extent that it amounts to a rule violation. If it doesn't
7 amount to a rule violation --

8 JUDGE LUTON: Okay.

9 MR. KRAUS: -- which the Commission said it doesn't,
10 it's not relevant. And another point --

11 JUDGE LUTON: That's a clear answer to my question.
12 That's all I wanted on that particular point. You got another
13 one to go to? Go ahead. I don't want to cut you off.

14 MR. KRAUS: Yeah.

15 JUDGE LUTON: Go ahead.

16 MR. KRAUS: The other point is that the -- there
17 really has been no adjudication as such.

18 JUDGE LUTON: Well, yeah, not in the final sense. It
19 was cut off by the settlement. Is that what you're going to
20 say?

21 MR. KRAUS: It was cut off by the what?

22 JUDGE LUTON: By the settlement.

23 MR. KRAUS: That's true in part, it was cut off by
24 the settlement, but if we are to get into any aspect of the
25 Liz Randolph case, we are looking -- and I say this only to be

1 | frank about it and candid, we're looking at a huge expansion
2 | of this hearing into a, into a matter which, which plows over
3 | ground which is now four years old already and has already
4 | been a subject of, of a settlement -- court approved
5 | settlement.

6 | JUDGE LUTON: Okay. I understand. You know, that
7 | -- I don't take that as a threat, but I do take it as
8 | something that doesn't really concern me, the fact that it
9 | might be a large undertaking. I won't make my ruling on that
10 | basis. BZZ's position is that, if I understood it correctly,
11 | that in the absence of a rule violation the Liz Randolph
12 | matter can play no part in this hearing, not either
13 | comparative or otherwise, can't have any -- can have nothing
14 | to do with the renewal expectancy or anything else. And it is
15 | further BZZ's position that, given the history of this
16 | proceeding and in particular the Commission's lack of a
17 | finding of an EEO violation in issuing the Designation Order
18 | when there was available to it the same facts that are being
19 | pushed now, prevents me from finding an EEO violation. Not
20 | being able to find an EEO violation, there is no reason to
21 | hear all of this nonsense. Is that right?

22 | MR. KRAUS: Yes, Your Honor.

23 | JUDGE LUTON: I won't call it nonsense. That's just
24 | a matter of convenience here, but --

25 | MR. KRAUS: Yes, Your Honor.

1 JUDGE LUTON: -- essentially that's, that's your
2 position?

3 MR. KRAUS: Exactly and the Commission's language
4 specifically was that Allegheny has not -- in the Hearing
5 Designation Order was that Allegheny has not demonstrated any
6 discrimination in recruiting, hiring or promoting of employees
7 by EZ on the, on the point that Mr. Berfield makes most
8 strongly which is the EEO point.

9 JUDGE LUTON: Okay. Now, Mr. Berfield, what is your
10 response again, in brief? Don't repeat all -- everything that
11 you've said thus far, but given the Commission's determination
12 in the Designation Order, which I think can fairly be read to
13 say that the EEO -- that the Liz Randolph matter did not
14 involve any violation of the Commission's EEO rules, in light
15 of that finding I guess two questions. We continue the
16 Allegheny's hope that I, after hearing this case, would
17 nevertheless find an EEO violation and, two, whether I found a
18 violation or not, the fact that certain conduct is at least
19 alleged, and it's alleged in a significant sort of way, ought
20 to have some effect on what, the renewal expectancy?

21 MR. BERFIELD: Yes, Your Honor.

22 JUDGE LUTON: Okay. Would you explain to me the
23 reasons for your views?

24 MR. BERFIELD: Well, with regard to the renewal
25 expectancy, they're making an assertion of EEO compliance and

1 they've put in exhibits and they said not only do we comply,
2 but we do better than what the Commission. In other words,
3 they're not limiting themselves to minimum -- a minimum
4 showing or a minimum standard. And it seems to me that to
5 rebut that, if you will, that we have -- but here at least was
6 an important instance in which the management of the station
7 was insensitive to the working conditions of an employee and
8 sexual harassment which the arbitrator says, in effect, would
9 also -- could well be considered a violation of the federal
10 laws.

11 JUDGE LUTON: All right. Stop right there. Thanks.
12 Now, let me get a response to that. If I understand Mr.
13 Berfield correctly what he's saying is that in order to take
14 some of the shine off of BZZ's effort to show outstanding
15 performance with respect to EEO matters, the Liz Randolph
16 matter is, albeit not a violation of the Commission's rules,
17 it nevertheless shows a set of conduct on the part of the
18 licensee and an EEO matter which ought to somehow impact by
19 reducing the shine that would otherwise be put on EZ's claim
20 of outstanding EEO performance. Is that permissible?

21 MR. KRAUS: Your Honor, there are two responses to
22 that that are appropriate and one is a serious question,
23 whether any of the Liz Randolph allegations really related
24 directly to the licensee. She made her complaint on what --
25 she walked off the job one day --

1 JUDGE LUTON: Right.

2 MR. KRAUS: -- and subsequently claimed that over a
3 four year period of time in which she had said nothing to the
4 station that she had been harassed. During the four year
5 period of time when she appeared on the air and where all the
6 alleged harassment was on the air -- in fact, it all was --
7 that there was, there was some -- that that reflected
8 adversely on her workmanship. The claim was against --
9 primarily against her colleagues, Quinn and Banana, the
10 morning crew, not against the licensee, but that's a factual
11 question which gets raised by this whole issue if we're going
12 to get into that. It's a very complicated -- I mean, it can
13 be quite complicated. But more important that that, I think
14 Mr. Berfield is arguing, and if throw dirt around enough, that
15 it must -- you know, it will stick somewhere, and the fact of
16 the matter is that Liz Randolph threw a bunch of dirt around
17 and now Allegheny is picking it up and trying to throw the
18 same dirt and hoping it will stick somewhere. But the fact is
19 that neither Allegheny nor Liz Randolph or anybody else can
20 show that the dirt, that alleged failure to, to meet
21 something, amounted to a violation of the EEO requirements --

22 JUDGE LUTON: I understand that.

23 MR. KRAUS: -- amounted to a violation of the EEO
24 rules. There was no violation. I don't see how conduct that
25 does not amount to a violation can be said to detract from the

1 | licensee's otherwise sterling performance.

2 | JUDGE LUTON: That's, that's the answer to my
3 | question. That's really all I wanted to hear from you. Mr.
4 | Zauner, what's your position, sir?

5 | MR. ZAUNER: Your Honor, I was just going to say
6 | that I think part of the problem here was that Exhibits 3 and
7 | 4 should not have been received and we made an objection to
8 | those and those are the two exhibits dealing with the EEO
9 | showing made by WBZZ. In the Bureau's opinion there is no --
10 | to EEO's, at least -- again, I'm talking in the renewal area
11 | and --

12 | JUDGE LUTON: You're talking about 3 and 4 of --

13 | MR. ZAUNER: That's right. And to the extent Mr.
14 | Berfield's argument is based upon the fact that 3 and 4 have
15 | come in --

16 | JUDGE LUTON: I see.

17 | MR. ZAUNER: -- it would be our position that they
18 | shouldn't have been received and then we objected to them.

19 | JUDGE LUTON: Oh, I see. Okay. Do you have an
20 | opinion about whether -- that wouldn't be fair to you since
21 | your position is that this whole business shouldn't be in the
22 | case anyway.

23 | MR. ZAUNER: Correct.

24 | JUDGE LUTON: I won't even ask the question. Mr.
25 | Berfield, I would be loath to conduct the hearing in such a

1 way as to seek to find a violation of the Commission's EEO
2 rules in light of the history of the case and the Commission's
3 disinclination to find such a violation on the basis of the
4 same material that Allegheny proffers at the present time,
5 number one. Number two, I will need to be shown some
6 authority for the proposition that the conduct that is
7 alleged. The dirt, as Mr. Krause put it, that's being thrown
8 around is properly to be considered on an applicant's renewal
9 expectancy, a case such as this. Do you have any kind of
10 authority to indicate that it would be proper and keeping with
11 precedent?

12 MR. BERFIELD: Well, I think, I think the GAF case
13 indicates that this is -- at least beats this test of an
14 allegation.

15 JUDGE LUTON: I think so. Anything beyond GAF?

16 MR. BERFIELD: No, but I'd like the opportunity to
17 -- if you want to reserve ruling, to do some further research
18 and to submit something.

19 JUDGE LUTON: Of course. I wouldn't expect you to
20 just cough up cases right now. It's --

21 MR. BERFIELD: I'd be happy to reserve offering
22 these until we meet again if you want or to some later date in
23 a couple of days to submit something to which they could
24 respond.

25 JUDGE LUTON: Okay. Remember now, I'm satisfied